Prime Time Shuttle International, Inc. *and* Kurios, Inc. Cases 31–CA–19392 and 31–CA–19475

August 24, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On March 11, 1993, Administrative Law Judge Jay R. Pollack issued the attached decision. Thereafter, the Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in support of the judge's decision and an answering brief to the Respondent's exceptions. The Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Prime Time Shuttle International, Inc., Sun Valley, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] We agree with the judge's conclusion that Kurios, Inc. is a labor organization under Sec. 2(5) of the Act. Indeed, we note that this conclusion is consistent with the requirements for labor organization status set forth by the majority opinion and concurrence in *E. I. du Pont & Co.*, 311 NLRB 893 (1993), which issued after the judge's decision.

Member Cohen finds it unnecessary to pass on the validity of the various opinions expressed in *Electromation, Inc.*, 309 NLRB 990 (1992); and *E. I. du Pont & Co.*, supra. He is satisfied that, under any of these views, the Kurios Drivers' Council is a statutory labor organization.

Member Cohen finds that Respondent did not establish a good-faith belief that employees engaged in misconduct. He does not agree with the test formulated by the judge in his decision. See fn. 3 of the judge's decision and accompanying text.

Ann L. Weinman, Esq., for the General Counsel.
Lloyd C. Ownbey Jr., Esq., of Pasadena, California, for the Respondent.
Helena Sunny Wise, Esq., of Burbank, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Los Angeles, California, on November 5, 6, 13, 19, and 20, 1992. On May 19, 1992, Kurios, Inc. (Kurios) filed the original charge in Case 31–CA–19392 alleging that Prime Time Shuttle International, Inc. (Respondent) committed certain violations of Section 8(a)(5), (3), and (1) of the National Labor Relations Act (the Act). On June 24, Kurios filed an amended charge alleging that Respondent had violated Section 8(a)(1) and (3) of the Act. Thereafter on July 22, Kurios filed the charge in Case 31–CA–19475 alleging that Respondent violated Section 8(a)(1) of the Act. The Acting Regional Director for Region 31 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent on July 1, 1992, in Case 31–CA–19392. On August 27, 1992, a consolidated complaint issued in both cases. The complaint alleges that Respondent was the employer of its ''independent contractor'' van drivers, that Kurios was a labor organization, that Respondent unlawfully discharged three employees for their activities on behalf of Kurios and unlawfully threatened to sue these employees because of their protected concerted activities. Respondent filed a timely answer to the complaints, denying all wrongdoing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and to cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent is a California corporation with an office and principal place of business located in Sun Valley, California, where it is engaged in providing passenger shuttle service to and from public passenger terminals. Respondent in the course and conduct of its business operations, annually purchases and receives goods and products valued in excess of $50,000 from sellers or suppliers located outside the State of California. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Prior to 1991, Respondent directly employed van drivers to drive passengers to and from airports in the greater Los Angeles area. In early 1991 Respondent experimented with the idea of having its drivers become ''independent contractors.'' A pilot program was begun with approximately 10 drivers. These drivers paid a fee for the use of their van and paid their own gas expenses. However, they received a higher commission than employees on scheduled business and were permitted to keep all revenues on unscheduled business.[1] The pilot program was suspended due to a lawsuit filed by a competing van company. The lawsuit was dismissed and in August 1991 Respondent required all its drivers to sign a ''prefranchise agreement'' making them ''inde-

[1] Scheduled business means a passenger who has a reservation with Respondent. Unscheduled business means a passenger without a reservation. While drivers are free to pick up unscheduled business there are certain restrictions. The unscheduled business must be approved by Respondent's dispatcher. Generally the unscheduled business must not interfere with the scheduled business and must be consistent with the principle of the most efficient route for ride-sharing purposes.

pendent contractors.'' Under the agreement the drivers paid a lease fee on a shift basis for using a van. Drivers were responsible for paying their gas expenses. Respondent was responsible for maintenance of the van. Apparently, under this arrangement drivers were able to increase their earnings. In addition to signing a prefranchise agreement each driver was required to pay a fee for disability insurance which was later changed to workers' compensation insurance.[2]

Under the prefranchise agreement drivers were required to wear the Prime Time uniform. Failure to wear the proper attire subjected a driver to a fine under the agreement. Respondent was required by airport regulations to have uniforms for its drivers but the particular design was left to Respondent. Drivers were also subject to fines for arriving late for their shifts, coming in late at the end of their shifts, for taking passengers without approval, for returning with less than a full tank of gas and for using a certain brand of gasoline which was prohibited by the agreement. At the end of each shift a driver was required to reconcile his receipts with one of Respondent's cashiers.

Although most of the agreements provided for the lease of a particular van, drivers did not necessarily receive their van but rather received an available van. The agreement did not provide for the lease rate and that rate was unilaterally changed by Respondent. Respondent unilaterally changed from a monthly deduction for disability insurance to a per shift charge for workers compensation insurance. Workers' compensation was required by the California Public Utilities Commission (PUC). During the term of the agreement Respondent unilaterally changed the method of payment by raising the lease rate and then absorbing the workers' compensation payment.

At the time of the execution of a prefranchise agreement, a driver was required to become a member of Kurios and to sign a written authorization to have $1 per shift deducted from his receipts and paid to Kurios. Kurios began as a drivers council to work with Respondent's management as a liaison with the drivers and as a means of making the operation more efficient. When the change was made to the ''independent contractor'' status of the prefranchise agreement, the intent was that Kurios be a driver association and help the drivers obtain health insurance and a gasoline tax credit. John Kindt Jr., Respondent's president and chief executive officer, set up Kurios and had his attorney incorporate the drivers council. Kindt suggested that Kurios have its own separate business location and suggested that its officers be paid for their time spent administering to the association's affairs.

B. *The Discharges*

Former employee Deborah Chase testified that she was the treasurer for Kurios in 1991. In March 1992 Chase became chairperson of Kurios. Joseph Cain was one of the original members of the Kurios board. As a member of the Kurios board, Cain discussed a draft of the proposed prefranchise agreement and was able to obtain one favorable term for the drivers. At Cain's suggestion, the agreement provided that the lease rate could not be raised without 10 days' notice. Gransberry testified that he was appointed to the Kurios board in February 1992 and elected to the position in March. According to Everett Gransberry, he meet with Kindt and other managers over driver concerns such as loop fees, procedures at airports, insurance and an awning for drivers waiting for vans. I find no merit to Respondent's contention that Gransberry was not a duly elected official of Kurios. The uncontradicted evidence clearly shows that Gransberry was first appointed by the board to a vacancy and then later voted to a position on the Kurios board. The credited evidence shows that Gransberry was appointed to fill a vacancy on the Kurios board and was later elected to that same position.

The members of Kurios' board, including discriminatees Chase, Cain, and Gransberry, met with Kindt and other supervisors of Respondent on a weekly basis. It is undisputed that Chase attended disciplinary meetings as a representative of drivers alleged to have committed driving infractions.

In February 1992, Kindt was informed by the Public Utilities Commission that the van drivers were considered to be employees for workers' compensation purposes and that Respondent was engaged in ''unlawful business practices'' by not providing the drivers with workers' compensation insurance. As a result of his communications with the PUC, Kindt reinstated workers' compensation insurance for the drivers and unilaterally charged the drivers $5 per shift for the coverage. The cost of the workers' compensation insurance was more expensive than the disability insurance previously charged on a monthly basis.

On March 5, Kindt notified the Kurios board and later all the drivers that Respondent had filed a petition in bankruptcy. Kindt incorrectly informed the Kurios board that Kurios was not a creditor in the proceeding. When Kindt notified the Kurios board of the bankruptcy filing, Gransberry asked some questions about the effect of the bankruptcy on the drivers. Kindt answered some of Gransberry's questions then lost his temper and swore at Gransberry.

In April the members of the Kurios board sought legal advice in dealing with Respondent. Respondent had filed for bankruptcy under Chapter 11 and Kurios was listed as a creditor. Checks from Respondent to Kurios had been returned by the bank as uncollected. Further, the drivers were concerned that the only way Kurios could receive the desired gasoline tax credit was to become the employer of record of the drivers. The drivers were afraid that such a filing would subject Kurios and the drivers to substantial liability.

Chase, Gransberry, and Cain obtained the services of a labor attorney, Helena Sunny Wise. On April 29, Wise wrote Kindt alleging that the drivers were employees and requesting that he bargain in good faith. Wise stated that she wished to bargain about the monies owed to Kurios, the gasoline tax credit and workers' compensation.

Upon receipt of Wise's letter, Kindt called Chase and told her that he was not going to deduct dues to allow Kurios to use an attorney against him. Kindt called back later and said, ''I don't understand.'' A few days later, Kindt accused the drivers of betraying him by suing him. He further stated that he could close down and that if the drivers ''wanted 300 jobs on their heads,'' he didn't care.

On May 12, Chase, Cain, and Gransberry circulated a petition advising the drivers that Kurios would continue to hold meetings and that the $1-per-shift dues should be paid di-

[2] Respondent was required by the State Public Utilities Commission to provide workers' compensation. It passed on the cost of workers' compensation to the drivers by charging them $5 per shift.

rectly to Kurios. Gransberry gave a copy of this petition to Mike Kaliczak, Respondent's driver supervisor.

On May 14 Chase, Gransberry, and Cain were each given a letter of termination. The employees were terminated separately and were prevented from communicating with other employees. When Cain came to work, he was escorted upstairs and given his termination letter. Cain was told that he should have resigned from Kurios. Kindt said it was the saddest decision he had ever had to make. That same date Kindt distributed a memorandum to all drivers expressing his dissatisfaction with Kurios and the three terminated drivers.

On May 19, Cain, Chase, and Gransberry sent a letter to all the drivers in which they urged the drivers to continue working. The letter stated that the three would continue to serve on the Kurios board. Finally, the letter stated that a drivers' meeting would be held on May 28. On June 24, Respondent, by an attorney, sent the three drivers a letter threatening to file a lawsuit against them for ''continuing to communicate with employees and contractors.''

Kindt testified that he believed the Kurios board had misappropriated funds because he had not been given an accounting of the association's funds. At the hearing, Chase accounted for the approximately $19 paid to Kurios. She testified that payments to board members for time spent at meetings was approved at an open meeting. This idea was suggested and approved by Kindt. Kurios made some payments toward health premiums for 18 employees including the three discriminatees. This was contemplated by formation of Kurios and not shown to be wrongful. The insurance plan was made available to all drivers. The three Kurios officers were discharged shortly after this program began. The result was that the policy was canceled for nonpayment of premiums.

C. *Contentions of the Parties*

The General Counsel and Kurios contend that the drivers were employees and not independent contractors. They argue that Kurios was a labor organization composed of driver employees. They further contend that Respondent violated Section 8(a)(3) and (1) of the Act by terminating the employment of Chase, Cain, and Gransberry because of their unwanted activities on behalf of Kurios and the other employees. The General Counsel and Kurios further argue that Respondent threatened to close its business and discharge the employees because of their activities on behalf of Kurios. Finally, the General Counsel and Kurios argue that Respondent threatened a frivolous lawsuit in order to preclude the employees from engaging in any further activities on behalf of Kurios or the employees.

Respondent argues that it was not the employer of the drivers but rather that the drivers were independent contractors. Respondent further argues that since the drivers were not employees, Kurios was not a labor organization. Respondent then argues that it cannot have violated the Act by terminating its agreements with the three drivers. Respondent contends that even if found to be the employer of the drivers that the terminations were for misdeeds and misappropriation of funds and, thus, for just cause.

Analysis and Conclusions

A. *The Independent Contractor Issue*

In determining the status of employees, the Board employs a ''right of control'' test. *Standard Oil Co.*, 230 NLRB 967 (1977); *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968). Among factors considered significant in connection with the ''right to control'' test in determining whether an employment relationship exists are (1) whether individuals perform functions that are an essential part of the Company's normal operations or operate an independent business; (2) whether they have a permanent working arrangement with the Company which will ordinarily continue as long as performance is satisfactory; (3) whether they do business in the Company's name with assistance from the Company's personnel and ordinarily sell only the Company's products; (4) whether the agreement which contains the terms and conditions under which they operate was promulgated and changed unilaterally by the Company; (5) whether they account to the Company for the funds they collect under a regular reporting system prescribed by the Company; (6) whether particular skills are required for the operations subject to the contract; (7) whether they have a proprietary interest in the work in which they are engaged; and (8) whether they have the opportunity to make decisions which involve risks taken by the independent businessman which may result in profit or loss. *Standard Oil Co.*, supra at 968.

The drivers clearly perform an essential part of Respondent's business. The business of the Respondent is providing shared rides to the public and its vans and drivers perform that function. Driving is not merely an essential part of Respondent's business it is Respondent's business. While on duty the drivers perform no other work. While theoretically they may have the power to do other work, the intent of all parties is that while on duty the drivers exclusively drive under the supervision of Respondent's dispatchers. The drivers can be fined for arriving late to work, returning a van late, driving out of route, over charging customers, returning with less than a full tank of gas, or for using prohibited fuel.

Under the ''prefranchise agreement'' it is assumed the drivers will continue to drive for Respondent as long as performance is satisfactory. The drivers drive for the public using Prime Time vans and Prime Time uniforms. Even for unscheduled business, the intent is that the customers will return for Prime Time's services rather than that of the driver. Even for unscheduled business, the drivers must obtain approval of Respondent's dispatchers. The drivers must contact a dispatcher after each delivery.

The contractual agreement was drafted by Respondent and drivers were required to sign the agreement in order to continue driving for Respondent. The agreement has been changed unilaterally by Respondent on several occasions. Respondent changed the disability insurance to workers' compensation and changed the rate paid by drivers unilaterally. Respondent also unilaterally set and changed the lease rate for its vans. The fares charged to customers are set by Respondent. On a daily basis the drivers' account to Respondent for their daily receipts under the reconciliation system set by Respondent. The skills required to perform can be taught to a licensed driver in 3 days. No special skills are required. Respondent has suspended employees for careless driving

and on one occasion required a driver to attend traffic school. The drivers have an incentive to maximize their income much the same as an employee working on commission. However, they really do not own anything or have a proprietary interest in a business. Most important, the drivers do not own the vans. Respondent owned the vans and paid for maintenance, liability insurance, and collision insurance. The drivers had the option to pay for a lower deductible collision insurance at a per shift rate set by Respondent. The drivers paid for fuel. Under all of the circumstances, I find Respondent retained the right to control the manner and means by which its drivers performed their duties and, therefore, that the drivers were employees of Respondent and not independent contractors. *Fort Wayne Newspapers*, 263 NLRB 854, 855 (1982); *Blackberry Creek Trucking*, 291 NLRB 474, 479–480 (1988). See also *Siracusa Moving & Storage*, 291 NLRB 143, 145–147 (1988).

B. *The Labor Organization Issue*

Section 2(5) of the Act defines a labor organization as follows:

> any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

In *NLRB v. Cabot Carbon Co*., 360 U.S. 203 (1959), the Supreme Court held that an employee committee that discussed with management various subjects pertaining to working conditions, wages, or grievances was a labor organization within the meaning of Section 2(5) even though the committee had no membership requirements, collected no dues, had no funds, and had never attempted to negotiate a collective-bargaining agreement. Accordingly, the Board has broadly construed the definition of labor organization under Section 2(5). *St. Anthony's Hospital*, 292 NLRB 1304 (1989).

In *Electromation, Inc*., 309 NLRB 990 (1992), the Board indicated that the definitional elements of a Section 2(5) organization require (1) employee participation, (2) a purpose to deal with employers, (3) concerning itself with conditions of employment or other statutory subjects, and (4) if an ''employer representation committee or plan'' is involved, evidence that the committee is in some way representing the employees.

Respondent contends that Kurios lacked the formality of a labor organization. Section 2(5) does not require a labor organization to have any formal structure. A group of individuals may comprise a labor organization even though they lack a constitution or bylaws, elected officials, formal meetings, dues, or other formal structure. *Columbia Transit Corp*., 237 NLRB 1196 (1978); *Arkay Packaging*, 221 NLRB 99 (1975). In the instant case, all the drivers belonged to Kurios and paid fees or dues as a condition of employment. Employees elected board members who were employees of Respondent. Kurios had a constitution and bylaws, meetings with employees, and meetings with the Respondent. Clearly, employees participated in the organization.

The term ''dealing with'' has been broadly construed to include various types of employee committees which discuss seniority, job classifications, holidays, vacations, and various other conditions of employment. *Cabot Carbon Co*., supra. Kurios met with Respondent regularly to discuss driving procedures and other matters which affected the drivers' employment. In disciplinary meetings a Kurios representative was present. On two such occasions a compromise on the discipline was reached. With respect to the filing of bankruptcy, the Kurios board spoke with Kindt as advocates for the employees. It was the adversary nature of these discussions which led to the discharges. Clearly the Kurios officers were acting in a representational capacity. Kurios definitely met the four requirements of Section 2(5). I find that Kurios was a labor organization whose purpose included dealing with Respondent regarding working conditions within the meaning of Section 2(5) of the Act.

Further, Respondent argues that no one intended that Kurios act as a union. If a purpose is to deal with an employer concerning conditions of employment, the Section 2(5) definition has been met regardless of whether the employer has created it, or fostered its creation, in order to avoid unionization or whether employees view that organization as equivalent to a union. *Electromation*, supra.

C. *The Discharges*

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp*., 462 U.S. 393, 399–403 (1983).

Section 8(a)(1) is violated if the Respondent knows of its employees' concerted activity, if the activity is protected by the Act, and if the adverse employment action is motivated by the employees' protected concerted actions. *Amelio's*, 301 NLRB 182 (1991). In general, to find an employee's activity to be ''concerted,'' the Board requires that it be engaged in with or on the authority of other employees, and not solely by and on behalf of himself. *Meyers Industries*, 281 NLRB 882, 885 (1986). The three drivers were acting as the Kurios board on behalf of the other drivers. The drivers were clearly acting in concert with each other as the Kurios board. Finally, the employees were acting on the authority of the driver-members of Kurios. Thus, Respondent knew the drivers were acting concertedly.

The discipline or discharge of employees for filing or processing grievances, whether pursuant to a formal contractual grievance procedure or informally in the absence of such a procedure, is generally held to be a violation of Section 8(a)(1). *John Sexton & Co*., 217 NLRB 80 (1975); *Ernst Steel Corp*., 212 NLRB 78 (1974); *Southwestern Bell Telephone Co*., 212 NLRB 43 (1974). Because grievance meetings are generally heated and emotional an employee's outburst will be protected unless the conduct is indefensible under the circumstances. *Postal Service v. NLRB*, 652 F.2d 409 (5th Cir. 1981); see also *Illinois Bell Telephone Co*., 259

NLRB 1240 (1982). Since Respondent was aware that the Kurios officers were representing employees and presenting grievances to management, Respondent knew of their protected concerted activities, notwithstanding the fact that Respondent was unaware of the legal significance of that conduct.

I find that General Counsel has made a prima facie showing that Respondent was motivated by the protected concerted activities of the three drivers in discharging Chase, Gransberry, and Cain. First, upon learning that the employees had obtained an attorney to represent employees, Kindt told Chase and Gransberry that he would close his business if they continued to negotiate with him—represent the drivers' interest. Shortly thereafter, Kindt discharged Chase, Cain, and Gransberry making reference to ''rumors'' complaining about the change in direction of the Kurios organization. Second, when Cain sought an explanation, Kindt stated that Cain should have resigned from Kurios. Kindt stated that this was the saddest business decision he had to make. Kindt made no mention of any misuse of Kurios' funds or the failure to give an accounting. Finally, Kindt took steps to prevent further communication between the Kurios officials and the driver-employees. Based on Kindt's statements and conduct, the three employees could only conclude that the discharges were based on their unwanted efforts to represent the drivers as agents of Kurios.

The burden shifts to Respondent to establish that the same action would have taken place in the absence of the employees' union and protected concerted activities. Respondent has shown no lawful reason for the discharges. As more fully discussed herein, the activities Respondent found offensive were protected by the Act.

Respondent contends that the employees misused or misappropriated Kurios' funds. I find no factual basis for the contention that Chase, Cain, and Gransberry misappropriated union funds. The payment for time spent on Kurios matters was approved by the employees and Kindt himself. The payment of health benefit premiums was consistent with the purpose of Kurios and there is no evidence that the three received any benefit not available to any other employee. The unlawful discharges caused the plan to fail. The three employees were no longer able to administer the health benefit plan. Respondent cannot rely on the failure to make payments caused by its unlawful discharges to justify or defend these discharges. Thus, I find that Respondent was unable to show any actual misconduct.

Respondent argues that Kindt perceived that the Kurios board had misappropriated the funds because no accounting of Kurios funds was given. I find that argument unconvincing. First, Kindt never gave that reason to the employees. Second, that lack of accounting had been condoned for sometime. No written request for an accounting was ever made. Kindt never explained why that became critical in May. Most important, the climax according to Kindt, was the employees' attempt to continue to collect dues after Kindt ordered an end to the payroll deduction. The collection of union dues and the accounting of such dues are an internal union matter. The discharge of these employees because Respondent did not approve of or appreciate their handling of union matters is itself a violation of Section 8(a)(3) of the Act. Respondent's lack of knowledge as to the legal significance of its actions is not a defense. In my view Respondent could defend such a discharge only by showing actual misconduct, i.e., that the employees actually misappropriated Kurios funds.[3] Respondent was unable to do so.

Assuming arguendo, that an accounting is not an internal union matter, an employer cannot carry its *Wright Line* burden simply by showing that it had a legitimate reason for the action, but must ''persuade'' that the action would have taken place even absent the protected conduct ''by a preponderance of the evidence.'' *Centre Property Management*, 277 NLRB 1376 (1985); *Roure Betrand Dupont, Inc*., 271 NLRB 443 (1984). It appears Kindt was not seriously concerned about an accounting until the letter from Attorney Wise arrived. I note that only the three employees attempting to collect dues were discharged and that another board member was not discharged. Further, Kindt implied to Cain that if Cain had resigned as a board member he would not have been discharged.

I find that the strong prima facie case was not rebutted by Respondent. Respondent must show that the three employees would have been discharged for lawful reasons even if they had not engaged in protected concerted activities or union activities. Rather, Respondent's defenses have bolstered the prima facie case. Accordingly, I find that the termination of Cain, Chase, and Gransberry was motivated by their protected union activities and that Respondent has not established that it would have discharged them absent that protected conduct. Thus, I find that Respondent has failed to carry its burden under *Wright Line* and that the discharge of the three employees violated Section 8(a)(3) and (1) of the Act. See *Bronco Wine Co*., 253 NLRB 53 (1981); *Hunter Douglas, Inc*., 277 NLRB 1179 (1985).

D. *The Lawsuit*

In *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), the Supreme Court held that the filing of a meritorious lawsuit did not violate the Act even if filed for a retaliatory motive. However, the filing of a frivolous lawsuit filed for a retaliatory motive constitutes a violation of the Act. Where the employer presents evidence that its state court action presents a genuine issue of law or fact, the Board should stay its proceeding until the state action has concluded. If the employer prevails in state court then the employer would prevail before the Board. However, if the employer is unsuccessful in state court, the Board may consider that decision in determining whether the case was frivolous and brought for retaliatory reasons. If a violation is found, the Board may order the employer to reimburse the employees wrongfully sued for their attorney's fees.

The Board has distinguished employer threats to sue employees for protected activity from the filing of employer lawsuits against employees. The Board has held, both before and after *Bill Johnson's*, that a threat by an employer to sue employees as a tactic to restrain the exercise of Section 7 rights is unlawful. *Consolidated Edison Co*., 286 NLRB 1031

[3] Sec. 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that employee was not, in fact, guilty of that misconduct. *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964). See also *Ideal Dyeing Co*., 300 NLRB 303 (1990).

(1987); *Carborundum Resistant Materials Corp*., 286 NLRB 1321 (1987).

In the instant case Respondent threatened the employees with a lawsuit if they continued to communicate with employees. This threat was in retaliation for the employees attempt to collect union dues. Accordingly, I find that Respondent violated Section 8(a)(1) by such conduct.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Kurios was a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees with the closing of its business and threatening to sue employees for engaging in union activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discharging Deborah Chase, Joseph Cain, and Everett Gransberry because of their activities on behalf of Kurios, Respondent violated Section 8(a)(3) and (1) of the Act.

5. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

I shall recommend that Respondent offer Deborah Chase, Joseph Cain, and Everett Gransberry full and immediate reinstatement to the positions they would have held, but for their unlawful discharges. Further, Respondent shall be directed to make Chase, Cain, and Gransberry whole for any and all losses of earnings and other rights, benefits, and privileges of employment they may have suffered by reason of Respondent's discrimination against them, with interest. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); See also *Florida Steel Corp*., 231 NLRB 651 (1977); and *Isis Plumbing Co*., 138 NLRB 716 (1962).

Respondent shall also be required to remove any and all references to its unlawful discharges of Chase, Cain, and Gransberry from its files and notify them in writing that this has been done and that the unlawful discharges will not be the basis for any adverse action against them in the future. *Sterling Sugars*, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

[4] All motions inconsistent with this recommended Order are hereby denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Prime Time Shuttle International, Inc., Sun Valley, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees in order to discourage union activities or other protected concerted activities.

(b) Threatening employees with closing its business or other retaliation for engaging in union activities.

(c) Threatening to sue employees because they engaged in union or protected concerted activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate employment to Deborah Chase, Joseph Cain, and Everett Gransberry to the positions they would have held, but for their unlawful discharges.

(b) Make whole Deborah Chase, Joseph Cain, and Everett Gransberry for any and all losses incurred as a result of Respondent's unlawful discharges of them, with interest, as provided in the remedy section of this decision.

(c) Remove from its files any and all references to the discharge of Deborah Chase, Joseph Cain, and Everett Gransberry and notify them in writing that this has been done and that Respondent's discharge of them will not be used against them in any future personnel actions.

(d) Post at its Sun Valley, California facilities copies of the attached Notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced, or covered by other material.

(e) Notify the Regional Director in writing within 20 days from the date of the Order what steps Respondent has taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees in order to discourage union activities or other protected concerted activities.

WE WILL NOT threaten employees with closing our business or other adverse action in order to discourage union activities.

WE WILL NOT threaten to sue employees because they engaged in union activities or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer immediate employment to Joseph Cain, Deborah Chase, and Everett Gransberry to the positions they would have held, but for their unlawful discharges.

WE WILL make whole Cain, Chase, and Gransberry for any and all losses incurred as a result of our unlawful discharges of them, with interest.

WE WILL remove from our files any and all references to the discharges of Cain, Chase, and Gransberry and notify them in writing that this has been done and that the fact of their discharges will not be used against them in any future personnel actions.

PRIME TIME SHUTTLE INTERNATIONAL, INC.